

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1245

To be argued by
EUGENE NEAL KAPLAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1245

UNITED STATES OF AMERICA,

Appellee,

—v.—

VANKIRK MOORE and HAROLD BURNELL,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

EUGENE NEAL KAPLAN,
JEFFREY E. LIVINGSTON,
ROBERT J. JOSSEN,
*Assistant United States Attorneys,
Of Counsel.*





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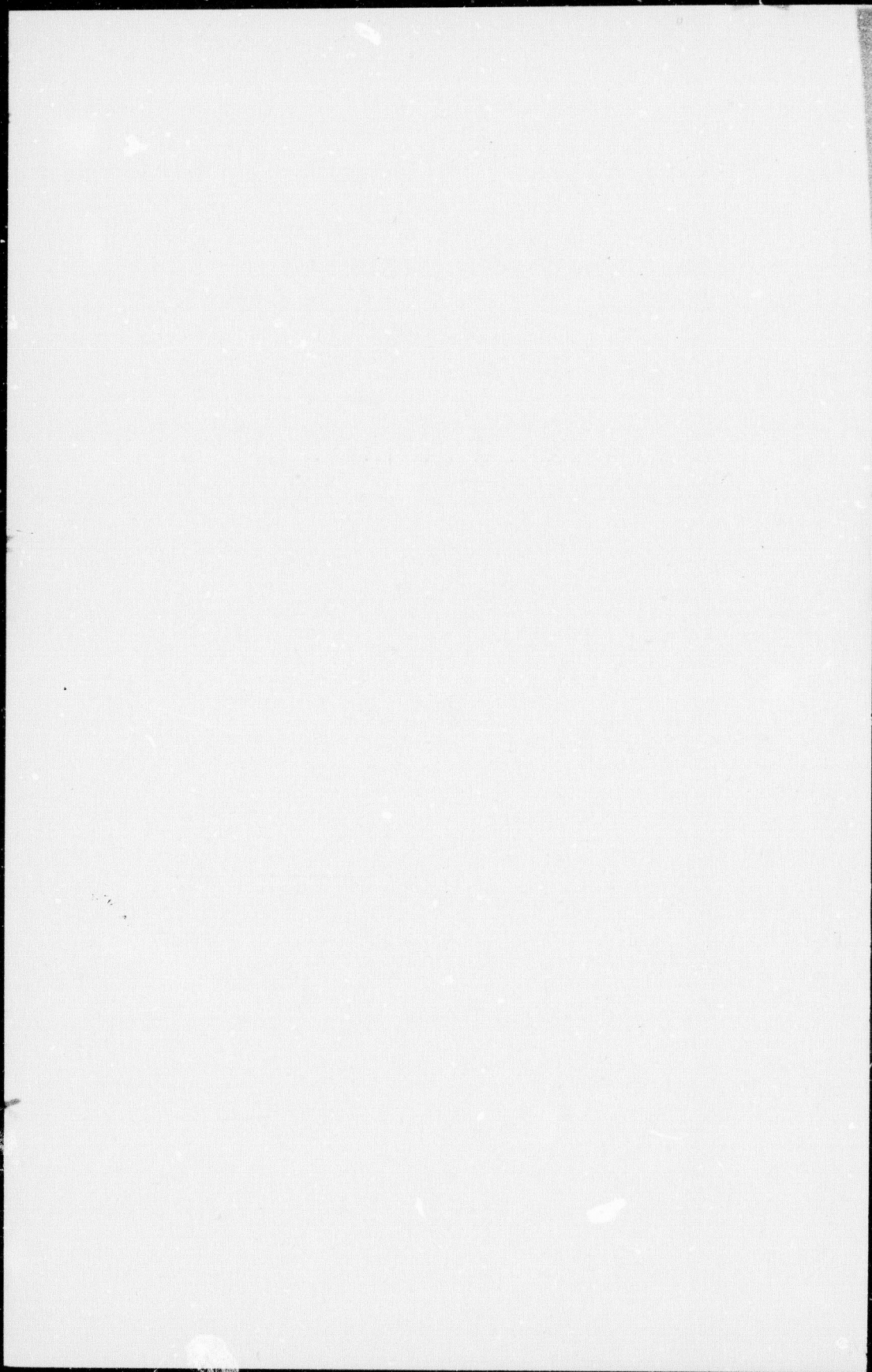
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VANKIRK MOORE and HAROLD BURNELL,
Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Vankirk Moore and Harold Burnell appeal from judgments of conviction entered in the United States District Court for the Southern District of New York on April 22, 1977, following a thirteen day trial before the Honorable Vincent L. Broderick, United States District Judge, and a jury.

Indictment 76 Cr. 1121, filed December 14, 1976, in four counts, charged Moore and Burnell with conspiracy to kidnap Henry "Buster" Huggins (Count One); the actual kidnapping of Huggins on December 1, 1976 (Count Two); conspiracy to commit extortion (Count Three); and, the transmission of an extortionate ransom demand in interstate commerce on December 1, 1976 (Count Four), in violation, respectively, of Title 18, United States Code, Sections 1201(c), 1201(a), 371, 875(a) and 2.

Trial against both defendants commenced on February 22, 1977, and concluded on March 11, 1977, when the jury returned verdicts of guilty against Burnell and Moore on each of the four counts.

On April 22, 1977, Judge Broderick, taking note of the "very serious nature of the charges" of which the defendants had been found guilty (Mre. Snt. Tr. 3; Bur. Snt. Tr. 2-3),* sentenced Moore and Burnell each to terms of life imprisonment on the kidnapping count (Count Two) and to lesser terms of ten years imprisonment on Count One and five years imprisonment on each of Counts Three and Four, the sentence on each of the counts to run concurrently.

The defendants are presently serving their respective sentences.

Statement of Facts

A. The Government's Case

1. Synopsis

The Government's case at trial overwhelmingly established that Burnell, also known as "Marion", and Moore, also known as "Tico", kidnapped Buster Huggins on December 1, 1976, and thereafter attempted to extort a ransom for his release. The kidnapping of Huggins by

* Abbreviations used in this brief are as follows: "Tr." refers to the transcript of the trial; "Bur. App. Br." refers to appellant Burnell's brief; "Mre. App. Br." refers to appellant Moore's brief; "Bur. Snt. Tr." refers to the transcript of the sentencing of Burnell; "Mre. Snt. Tr." refers to the transcript of the sentencing of Moore; "GX" refers to Government exhibits at trial; and "DX" refers to defendant Burnell's exhibits at trial.

Burnell and Moore marked the execution of carefully laid plans established by defendants weeks before Huggins' disappearance. Defendants' bold and repeated ransom demands for \$250,000, however, were thwarted by the FBI's investigation, and Burnell and Moore were apprehended before any money was collected for Huggins' release. The kidnapping victim, Buster Huggins, however, was never again seen after his disappearance at defendants' hands on December 1, 1976, nor has his body been found.*

2. The Early Plans to Kidnap Huggins

The plan to kidnap Huggins was not hatched on the spur of the moment, but resulted from several months of planning by Burnell and Moore. In early November 1976, Burnell had two conversations in which the precise extent and nature of his and Moore's plan to kidnap Huggins was revealed for the first time.** Burnell first approached Kissoon "Kojak" Adams and asked him to join with Moore and himself in kidnapping Huggins for a \$250,000 ransom, of which Adams was to earn \$25,000. (Tr. 368-69). Adams was not interested in this plot and did not pursue the invitation. (Tr. 369).

Burnell next discussed the planned kidnapping with his girlfriend, Mary Burch, between November 7th and 18th. (Tr. 342; 346). Burnell advised Burch that Moore

* Since on this appeal defendants do not generally challenge the sufficiency of the evidence, except with respect to the interstate elements of the crimes charged, the Government's proof is reviewed below in somewhat summary fashion.

** Burnell had had earlier discussions about the kidnapping venture. Thus, for example, in the fall of 1976, Burnell approached Janet Lee, one of Huggins' girlfriends (Tr. 734, 752-53), to seek out her aid in this endeavor. (Tr. 745-46). Lee, however, thought Burnell to be joking and dismissed the idea. (Tr. 746, 775-76).

was planning to "rip Huggins off" (Tr. 346-47) and that only he, Moore, and Adams knew of the plot (Tr. 347).^{*} Burnell boasted that he would have nothing to do with the actual kidnapping of Huggins, other than sharing with Moore in the ransom proceeds but, would go to work at the H & S Transmission Shop, thereby insulating himself from detection in the crime. (Tr. 348-49). According to Burnell, he and Moore would hold Huggins for a lot of money. (Tr. 348). Finally, Burnell told Burch that Moore would have somebody take Huggins out of the states where he would never be found. (Tr. 348-49; 509-13).^{**}

3. December 1, 1976: The Kidnapping of Huggins

In accordance with their stated plans, Moore and Burnell carried out the kidnapping of Huggins on December 1, 1976. At about 4:30 that afternoon, Burnell and Huggins met at the H & S Transmission Shop, owned by Huggins (Tr. 128).^{***} and at which Burnell worked (Tr. 129), where they made arrangements to meet later that evening at Burnell's apartment. (Tr. 644; 1118). At 8 o'clock, Huggins arrived at the apartment of his girlfriend, Janet Lee (Tr. 739-40), at 1818 Anthony Ave-

^{*} Burnell also told her that Adams was "messaging around" so that Moore was thinking of "ripping him off" too. (Tr. 348).

^{**} At trial, Burch recounted this conversation in a fashion which varied from her prior grand jury testimony. (Tr. 509-10). The Government then placed her grand jury testimony before the trial jury and argued its affirmative use. (Tr. 636, 1792-95). See Fed. R. Evid. 801(d)(1)(A), and the antecedent case law in this Circuit, e.g., *United States v. DeSisto*, 329 F.2d 929 (2d Cir.), cert. denied, 377 U.S. 979 (1964); *United States v. Jordano*, 521 F.2d 695, 697 (2d Cir. 1975); *United States v. Rivera*, 513 F.2d 519, 525-28 (2d Cir.), cert. denied, 423 U.S. 948 (1975).

^{***} Huggins was also a dealer in narcotic drugs (Tr. 128-29), as apparently were the defendants—although this latter fact was never made known to the jury. See Bur. Snt. Tr. 3-4; 7-8; Transcript of Suppression Hearing on February 24, 1977 at 73-74.

nue in the Bronx, New York (Tr. 733), the same building where Burnell resided in apartment 3A. (Tr. 736). After making several telephone calls and asking Lee for Burnell's apartment number, Huggins called Burnell and said he was coming downstairs to see him. (Tr. 740). Lee, who had seen Moore in Burnell's apartment earlier that same evening (Tr. 738-39), accompanied Huggins to the elevator and pressed the third floor elevator button for him. Lee did not see Huggins again after he left. (Tr. 738-41).

At Burnell's apartment Huggins was kidnapped and, apart from his kidnappers, was never seen again. (Tr. 744).*

Later that night the first of several ransom demands for Huggins' release was made by defendants. Burnell first called Huggins' parents in South Carolina and spoke with Mrs. Huggins—the victim's mother. (Tr. 886). Burnell demanded a quarter of a million dollars for Huggins' safe release. (Tr. 886). Burnell instructed that Mr. Huggins, the victim's father, and Martha Wigfall, the victim's common-law wife (Tr. 126), were to bring the ransom money to the H & S shop on Friday, December 3. (Tr. 887; 914). To prove that they held Huggins and that he was then alive, Burnell permitted

* Immediately thereafter, Burnell began to fabricate an alibi consistent with what he had earlier told Burch. Thus, ten minutes after Huggins left Janet Lee's apartment, Burnell showed up to ask Huggins' whereabouts. (Tr. 742). Lee told him that Huggins had left to see him about ten minutes earlier. (Tr. 743). Then, about then minutes later, Burnell called Lee over the building intercom and told her that he still hadn't seen Huggins, but that he did see Huggins' car parked in front of 1818 Anthony Avenue. (Tr. 743). Another five or ten minutes went by and then Burnell again called Lee on the intercom and told her that he had not seen Huggins and that now Huggins' Cadillac was gone. (Tr. 743).

In fact, Huggins' automobile was transported by defendants to a long-term parking lot located at JFK airport, where it remained undiscovered until December 23, 1976. (Tr. 1152). The

[Footnote continued on following page]

Huggins to get on the phone and plead with his mother to "do what these men say." (Tr. 887).*

A second ransom demand was then made to Martha Wigfall, Huggins' common-law wife. Burnell called Wigfall's home and spoke with her brother, Mark. (Tr. 230). In this call, Burnell announced that "we have Buster," demanded \$250,000 for his release, and threatened to kill Huggins if the police interceded. (Tr. 230). Mark Wigfall then called his sister at the Old Colony Bar, where she had gone to meet Huggins, and advised her of the ransom demand. (Tr. 131-32; 231). Ms. Wigfall returned home, where she was met by one of Huggins' brothers.** Together they went out to look for Huggins, but to no avail.

4. December 2-3, 1976: The Ransom Demands Continue

At about 6:30 the next morning, December 2nd, Martha Wigfall received a call from Burnell. (Tr. 134-35). Burnell told Wigfall that "[w]e have Buster . . . we want \$250,000" and that this ransom should be brought to the H&S shop by herself and Huggins' father the next day, Friday, December 3rd, at 4:00 P.M. (Tr. 135).

keys to Huggins' car were, however, discovered in Moore's apartment by FBI agents on the evening of December 4th. (Tr. 1380-81; GX 35).

* Mrs. Huggins testified concerning this call in the following manner:

" . . . this young man came on the phone and he says, 'Mrs. Huggins, I got your Buster kidnapped, your son kidnapped, and I'm asking for a quarter of a million dollars if you would like to see your son alive again.'

"Then Buster came on the phone and he said, 'Ma,' he said, 'do what these men say.' . . ." (Tr. 886-87).

Ira Huggins, the victim's brother, who also listened to this call, not only corroborated his mother's testimony, but identified Burnell as the caller. (Tr. 913-14, 918-19, 927-33).

** Huggins had eight siblings, six brothers and two sisters. (Tr. 885, 912).

This time, Burnell refused to put Huggins on the phone because "he already spoke to his mother last night." (Tr. 135).

In the afternoon of December 2nd, the FBI entered the investigation, and, among other things, placed a recording device on Martha Wigfall's phone. (Tr. 137).^{*} Based on information received from Huggins' brother, Ricky (Tr. 947-48)—who had recognized Burnell's voice during the 6:30 call to Wigfall (Tr. 136; 947-49; 1015-16; 1107)—FBI agents visited Burnell's apartment looking for Huggins. (Tr. 949-51). Upon entering Burnell's apartment on a ruse the agents observed Burnell and secured his physical description. Huggins, however, was not in the apartment. (Tr. 950-51). The agents also observed Burnell's car, a 1968 brown Buick Wildcat with South Carolina plates, parked nearby on the street and they recorded its license plate numbers. (Tr. 950-51).

In the early morning hours of December 3, 1976, Mark Wigfall received another demand call at his sister's apartment from Burnell. (Tr. 232-33; 373-74; 522-23; 645-46; 746; 802; GX 1). In this call, which was recorded, Burnell left instructions for Martha Wigfall to bring the ransom wrapped in "shopping bags" to the transmission shop at 4:00 that afternoon. (Tr. 232; GX 1).

Later that day, following the kidnappers' instructions, Martha Wigfall proceeded to the H&S shop at about 4 o'clock. (Tr. 139).^{**} At the shop Wigfall received another call from Burnell. Wigfall told Burnell that she had

^{*} That recorder taped two conversations (GX 1), the first of which was identified as containing Burnell's voice (Tr. 373-74; 522-23; 645-46; 746; 802), and the second as containing Moore's. (Tr. 374; 802-04).

^{**} Ms. Wigfall was accompanied to the shop by both Samuel Huggins, one of the victim's brothers who had arrived from South Carolina, and several FBI agents. (Tr. 139).

only secured \$50,000 in ransom money. Burnell reluctantly gave her one more day to secure the balance. (Tr. 139-40).

Following this aborted attempt to collect the ransom, Martha Wigfall returned to her home. Late that evening she received a call from Moore, which was also recorded. (Tr. 141-43; 374; 802-04; GX 1). Moore, claiming to be "Buster's" boss (Tr. 141), excoriated Wigfall for not having had the entire \$250,000 available earlier that day as Burnell had directed (Tr. 141; GX 1), and told her that he was getting ready to take "this mother fucker [Huggins] out of town tonight." (Tr. 142-43; GX 1). While Moore refused to let Wigfall speak with Huggins, Moore acknowledged that he and Burnell had allowed their victim to speak with his mother on Wednesday night. (Tr. 142-43; GX 1). Moore directed Martha Wigfall to return to the H&S shop at 4 o'clock on Saturday to await further word concerning delivery of the ransom payment. (Tr. 141-43; GX 1).

5. December 4, 1976: The Ransom Plan Collapses and Defendants Are Arrested

On Saturday, December 4th, at about 4 P.M., Martha Wigfall, Samuel Huggins and a number of FBI agents returned to the H&S shop. (Tr. 146). In rapid succession Wigfall received three calls from Burnell and Moore, each of which was recorded on a device installed by the FBI. (Tr. 146-49; GX 2).

In the first call, Burnell inquired if Wigfall had secured the ransom money. Wigfall told Burnell that she had only been able to obtain about \$100,000. (Tr. 147; 374-75; 524; 646-47; 746-47; 804; GX 2).* Burnell

* In fact, Ms. Wigfall was able to raise only about \$8700 (Tr. 146; 188), the rest of the ransom package being made up of "play" money provided to her by the FBI. (Tr. 217).

responded that Moore would call Wigfall back in about ten minutes. (Tr. 147; GX 2). Minutes later Moore called the garage (Tr. 147; 647; 805; GX 2)* and told Wigfall that although Huggins was worth much more than \$100,000, the kidnappers would accept the lesser amount. (Tr. 148; GX 2). Finally, Moore told Wigfall that she would receive further instructions concerning the ransom drop in about three minutes. (Tr. 148; GX 2).

About twenty minutes later, Burnell called the shop for a second time. (Tr. 149; 376-77; 524-25; 647-48; 747-48; 805-06; GX 2). He provided Wigfall with a set of complicated instructions directing her to the pay telephones alongside Nathan's Restaurant, located near the Korvette's Shopping Center on Druckner Boulevard and White Plains Road in the Bronx, where she would receive a fourth call containing instructions as to the location of the ransom drop.** (Tr. 149; GX 2).

Martha Wigfall and Samuel Huggins then drove to the designated telephones at the Nathan's parking lot (Tr. 152), as did a number of FBI agents, who also went to the adjacent Korvette's parking lot. (Tr. 952). At the Korvette's lot, Agents Gilkerson and Martinez observed Burnell and Moore sitting in the brown Buick which had earlier been determined to be Burnell's car. (Tr. 952-53; 1110).

* The identification of Moore's voice on this call was made difficult by the fact that he had placed a washcloth over the telephone mouthpiece in an attempt to hinder detection. (Tr. 970; GX 31).

** During this call, Wigfall remarked that Burnell's voice had suddenly become blurry. (GX 2). The blurriness may be explained by Burnell's possession of a square-shaped piece of black cloth, the purpose of which was to conceal Burnell's identity in a fashion similar to Moore's use of his washcloth. (Tr. 1129; GX 10A).

Gilkerson observed Moore on a pay telephone in the Korvette's lot precisely at the moment that Wigfall was receiving a call from one of the kidnappers on a phone in Nathan's lot. (Tr. 1069-70). In this call, Moore told Wigfall to deliver the ransom to Rocky Point Lookout* on the Palisades Parkway in New Jersey, where she was instructed to drop the money into the middle can of three garbage cans. (Tr. 152-53). Wigfall asked Moore if Huggins would be there. Moore advised her to return to the pay telephone at Nathan's at 8:30 that evening for further instructions concerning where she would find Huggins. (Tr. 152-53).**

Following completion of this call, agents of the FBI arrested Burnell and Moore. (Tr. 956; 1111). Moore was immediately given a pat-down search and a large folding knife was found concealed on his person. (Tr. 957; GX 29).*** After being advised of his constitutional rights, Moore denied knowing Huggins or his whereabouts. (Tr. 962). Moore also falsely identified himself as his brother, Lennox Moore. (Tr. 962; 977).

At trial, the Government introduced various other significant items found on Moore at the time of his arrest: a wash cloth (Tr. 970-71; GX 31), *supra*, p. 9;

* Rockefeller Lookout Point.

** Two Kaufman Carpet receipts belonging to Moore from a store in Lodi, New Jersey, later were discovered in Burnell's car. (Tr. 1160; GX 21A and B). From the dates on these receipts and the location of the store, the jury could conclude that Moore recently had surveyed the ransom "drop" area.

*** A subsequent search of Burnell's automobile at FBI headquarters produced not only a bayonet (Tr. 1160-69; GX 14), but a loaded .357 magnum revolver as well. (Tr. 1270-74; 1300; GX 20). The revolver was contained in a locked canvas bag (Tr. 1269; GX 18), the key to which was located on a key ring in Moore's possession. (Tr. 1269-74; GX 31).

the keys which opened the canvas bag containing the revolver found in Burnell's car (Tr. 966; 1332-33; GX 28), and two business cards. (Tr. 967-71; 1319; GX 30A and B). Both of these cards contained identical printing on the front side, but on the back each had telephone numbers written in pencil. (Tr. 967). GX 30B, a card found in Moore's card case, contained the word "Nat" and the number 323-9399—the telephone number for one of the pay telephones located inside of the Nathan's Restaurant. (Tr. 1331). GX 30A, a card which Moore unsuccessfully attempted to destroy en route to the FBI headquarters (Tr. 1317-18) and which fell out of his clothing while he was being searched (Tr. 1319), contained two numbers, 323-8888 and 323-8786—telephone numbers for the pay telephones located outside of Nathan's Restaurant at which Wigfall had received the most recent call from Moore. (Tr. 1331). After several exculpatory explanations concerning his possession of this card (Tr. 976; 981-82), Moore admitted that he had made a call from the pay telephone at Korvette's to a woman at one of the phone numbers contained on GX 30A (Tr. 981-82)—in short, that he had called Martha Wigfall and instructed her concerning the ransom drop in New Jersey. (Tr. 974-84).^{*} Also, during this post arrest questioning Moore denied that it was his voice on the tape-recorded calls (Tr. 975) and told the agents that he was not worried about the charges against him, because he had evidence that would clear him. (Tr.

^{*} In fact, what Moore said after his arrest incriminated Burnell as well. (Tr. 30-50). For example, he stated that Burnell had offered him \$2000 to call Wigfall at Nathan's and had given him GX 30A for that purpose. (Tr. 38-39). This and other such statements, however, were redacted prior to trial, in accordance with *Bruton v. United States*, 391 U.S. 123 (1968). (Tr. 30-50).

984).^{*} Moore also denied any knowledge about the ransom bag (GX 18) or the gun contained inside of it (GX 20; Tr. 981), despite the fact that one of his keys (GX 28) opened the lock to that bag. (Tr. 1334).^{**}

Following his arrest, Burnell also was interviewed by the FBI. (Tr. 1118). He told the agents that, while he knew Huggins, he had last seen him on the afternoon of December 1st, at the H&S shop. (Tr. 1118).^{***} Although Burnell declined to make any further statements to the agents, he subsequently made a number of admissions to Mary Burch, including that he was on the recorded ransom demand calls. (Tr. 622).

B. The Defendants' Case

Neither defendant testified although each presented evidence. Burnell's case consisted of the testimony of Nathaniel Freeman (an employee at H&S Transmissions) (Tr. 1433-62) and four FBI agents, ^{****} who testified concerning several alleged prior inconsistent statements made by a number of Government witnesses.^{*****}

Moore's case consisted of the testimony of his mother and father (Tr. 1548-59; 1629-52), who stated that it

^{*} No such evidence was forthcoming at trial.

^{**} In addition, using the address contained on the carpet receipts found in Burnell's car, *supra*, p. 10, agents of the FBI went to Moore's apartment, Apartment 6-H, 1791 Walton Avenue, the Bronx, and located Buster Huggins' key ring. (Tr. 1380-81; GX 35). When he was shown these keys, Moore denied having seen them before. (Tr. 982-83; GX 35).

^{***} Burnell's initial statement to the FBI was that he did not know of Huggins' whereabouts. (Tr. 1112).

^{****} David Martinez (Tr. 1468-77); Richard Berry (Tr. 1498-1512; 1520-23); Edwin H. Peterson (Tr. 1513-17); and Stephen Gilkerson (Tr. 1523-48).

^{*****} In addition, Freeman was called upon to misidentify a tape recording. (Tr. 1454-55; 1561; DX B).

was not their son's voice on the recorded ransom demand calls. (Tr. 1553-55; 1639-42).*

ARGUMENT

POINT I

The Evidence of the Interstate Nexus on Counts One and Two of the Indictment Was Sufficient.

The entirety of Moore's appellate brief and the first two points of that submitted by Burnell are devoted to raising for the first time on appeal certain challenges to the sufficiency of the evidence on the interstate element** of the conspiracy to kidnap and kidnapping counts of which they were found guilty (Counts 1 and 2). In particular, for the first time on appeal defendants assail the constitutionality of the statutory presumption of interstate or foreign transportation contained in 18 U.S.C. § 1201(b).*** Defendants' arguments are without merit. First, in the trial court, defendants failed to assert the claims that they now make and, by reason of this lack of objection—indeed, by virtue of their own strategic and tactical decisions—cannot raise these issues for the first time on appeal. Second, the evidence at trial was plainly sufficient to satisfy the interstate element, even apart from the § 1201(b) presumption.

* Moore also called FBI Agent Gilkerson. (Tr. 1566-1611).

** As used herein, the term "interstate element" refers to the transportation of the kidnap victim in interstate or foreign commerce. 18 U.S.C. § 1201(a)(1).

*** The statutory presumption specified in 18 U.S.C. § 1201(b) is as follows:

"With respect to subsection (a)(1) . . . the failure to release the victim within twenty-four hours after he shall have been unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted, or carried away shall create a *rebuttable presumption* that such person has been transported in interstate or foreign commerce." [Emphasis supplied.]

Finally, while we submit that the Court should not reach the issue, the rebuttable presumption of interstate or foreign transportation contained in 18 U.S.C. § 1201(b) is constitutional, especially as applied in this case.

A. Defendants' failure to object in the District Court.

Defendants concede that at no time in the District Court did they attack the constitutionality of the interstate element presumption, nor did they object to Judge Broderick's charge on this point. Moreover, a review of the trial record makes clear that defendants did not even specifically claim the evidence was insufficient on the element of transportation in interstate commerce.

After the Government rested, counsel for Burnell and Moore addressed cursory motions to the District Court under Fed. R. Crim. P. 29. (Tr. 1424-25).^{*} After both sides rested, the trial judge afforded defense counsel an opportunity to argue their Rule 29 motions. (Tr. 1666ff).

^{*} The district judge was prepared to hear argument on defendants' Rule 29 motions immediately after the Government rested. (Tr. 1384; 1389). Defense counsel, however, decided first to challenge the sufficiency of the indictment and of the evidence before the Grand Jury. (Tr. 1387ff). During the course of these belated Rule 12 motions, trial counsel for Moore at one point remarked: "I would like to add, your Honor, that as to Count 2, that the defendants Burnell and Moore took Buster Huggins and transported him in interstate and foreign commerce, that I think there is no evidence of that." (Tr. 1421). This ambiguous remark thereafter was never explained by defense counsel. (Tr. 1421ff). Even if now construed to be an attack on the sufficiency of proof on the interstate element, the argument was never again articulated, much less clarified, when the trial court heard argument on defendants' Rule 29 motions. (Tr. 1666ff). Instead, all that Moore's counsel did was to join in the motions advanced by Burnell (Tr. 1687), which never discussed the issues now sought to be raised. At best, this remark demonstrates defense counsel's awareness of the issue presently advanced and the subsequent deliberate choice not to pursue the matter.

In his argument, counsel for Burnell made absolutely no mention of the issues now raised in this Court.* (Tr. 1679-87). Moore's attorney added nothing to these motions, but merely joined in the arguments advanced by Burnell's lawyer. (Tr. 1687). After hearing counsel, Judge Broderick made the findings required under *United States v. Taylor*, 464 F.2d 240 (2d Cir. 1972), and denied these motions. (Tr. 1687-88).

The district judge next proceeded with rulings on requests to charge. (Tr. 1690ff).** When the judge stated his intention to charge in substance Government Request No. 14 (Tr. 1703)—a proposed instruction dealing with the interstate element of the kidnapping count and containing reference to the § 1201(b) presumption—defense counsel voiced absolutely no objection. (*Id.*).**

In the charge to the jury,**** Judge Broderick instructed that proof of transportation in interstate com-

* That trial counsel for Burnell never suggested, much less affirmatively raised, any challenge to the sufficiency of the Government's proof with respect to the interstate nexus is apparent from the record which shows him far more interested in pursuing irrelevant questions, such as the credibility of the Government's witnesses. (Tr. 1682-85).

In fact, Burnell devoted most of his argument to a challenge to the sufficiency of the Government's proof on Counts Three and Four (Tr. 1666-79) — indeed, taking pains to call a purported lack of jurisdiction concerning these counts to the trial court's attention. (Tr. 1672).

** Neither defense counsel submitted any requested instruction with respect to the elements of any of the offenses charged, in general, or the § 1201(b) presumption, in particular.

*** The Government served its Requests to Charge on February 17, 1977, five days in advance of trial. Thus, defense counsel had ample opportunity to read and consider these requests.

**** It should be noted that, in summation, the Government never mentioned the § 1201(b) presumption, arguing instead the fact of Huggins' transportation interstate from the specific evidence in this case (Tr. 1798-99), and that defense counsel never questioned the interstate nexus.

merce was an essential element that the Government had to prove beyond a reasonable doubt. With respect to this element the trial court also charged on the § 1201(b) presumption as follows:

"Under the law, the failure to release a kidnapping victim within 24 hours creates a presumption that the victim has been transported in interstate or foreign commerce, and you may so find. You are not required to so find. This presumption is not conclusive, and it may be refuted or disproved by contrary evidence, and it may simply not be accepted by you as jurors.

In sum, you are to look at all the evidence in this case, not only the presumption that I just mentioned to you but the entirety of the proof before you and decide whether or not the government has proved beyond a reasonable doubt that Buster Huggins was in fact transported in interstate or foreign commerce." * (Tr. 2014).

No exception or objection was taken to this instruction by either Burnell or Moore. (Tr. 2027ff).

B. The present challenges of Burnell and Moore to the general sufficiency of the evidence on the interstate element and to the constitutionality of 18 U.S.C. § 1201(b) have been waived.

Notwithstanding their failure to have raised the issue in the District Court or to have based their defense on this ground, Burnell and Moore now urge this Court to hold the presumption contained in 18 U.S.C. § 1201(b) unconstitutional and to upset the jury's verdict on the kidnapping counts for lack of sufficient evidence of an

* The trial court concluded its instructions on this point by again reminding the jury that it had to acquit defendants on Count 2 unless the Government proved "such transportation beyond a reasonable doubt." *Id.*

interstate nexus. In the face of defendants' waiver of these issues, this Court should not reach their much-belated attack. Moreover, in the circumstances of this case—where defendants clearly had available the same arguments now pressed for the first time on this appeal, but chose for tactical and other reasons not to raise the issues—the discretionary doctrine of noticing plain error should not be applied.

For sound policy reasons that go to the core of our judicial system, this Court repeatedly has refused to consider on appeal issues that could have been, but were not, raised in the first instance in the trial court. Indeed, only recently in response to a situation closely akin to that presented at bar, this Court emphasized the settled law in this Circuit

“that where a party has shifted his position on appeal and advances arguments available but not pressed below [citation omitted], and where a party has had ample opportunity to make the point in the trial court in a timely manner [citation omitted], waiver will bar raising the issue on appeal.” *United States v. Braunig*, 553 F.2d 777, 780 (2d Cir.), *cert. denied*, U.S. (1977).*

The compelling rationale underlying the rule of waiver—that a belated attack on an issue conceded or not raised in the trial court would thwart the orderly resolution of controversies and deprive both the trial judge as well as the adverse party of the opportunity to address the issue when it can be dealt with expeditiously and

* *Accord*, e.g., Fed. R. Crim. P. 30; *United States v. Martinez-Carcano*, Dkt. No. 77-1041, slip op. 4325, 4329 (2d Cir., June 21, 1977); *United States v. Fury*, 554 F.2d 522, 527 (2d Cir. 1977); *United States v. Hendrix*, 542 F.2d 879, 882-83 (2d Cir. 1976); *United States v. Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966).

efficiently—makes that doctrine applicable to untimely constitutional claims and objections to a trial court's charge, as well as belated claims in general. *United States v. Indiviglio*, *supra*. See also *Wainwright v. Sykes*, — U.S. —, 97 S.Ct. 2497, 2508 (1977); *Henderson v. Kibbe*, U.S. —, 45 U.S.L.W. 4457, 4460 (May 16, 1977); *Estelle v. Williams*, 425 U.S. 501 (1976).*

* It is to prevent the sort of appellate ambush attempted here that "[f]ederal courts, including the Supreme Court, have declined to notice [alleged] errors not objected to below even though such errors involve a criminal defendant's constitutional rights." *United States v. Indiviglio*, *supra*, 352 F.2d at 280. See also *Estelle v. Williams*, *supra*, 425 U.S. at 508 n.3: "The reason for this rule is clear: if the defendant has an objection, there is an obligation to call the matter to the court's attention so the trial judge will have an opportunity to remedy the situation."

The Supreme Court's most recent expression on this subject emphasizes the strong federal interest against recognition of belated claims such as those presented here for the first time on appeal. Thus, in *Wainwright v. Sykes*, *supra*, 97 S.Ct. at 2508, Mr. Justice Rhenquist observed in a related, but different, context the great danger that permitting issues to be raised out of the orderly processes would

"encourage 'sand bagging' on the part of defense lawyers, who may take their chances on a verdict of not guilty in a . . . trial court and intend to raise their constitutional claims [on appeal] if their initial gamble does not pay off."

Similarly, in *Henderson v. Kibbe*, *supra*, 45 U.S.L.W. at 4460, Mr. Justice Stevens emphasized the fundamental point that:

"Orderly procedure requires that the respective adversaries' views as to how the jury should be instructed be presented to the trial judge in time to enable him to deliver an accurate charge and to minimize the risk of committing reversible error. It is the *rare* case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court [footnotes omitted and emphasis supplied]."

See also *United States v. Cheung Kin Ping*, 555 F.2d 1069, 1074 (2d Cir. 1977); *United States v. MacDougal-Pena*, 545 F.2d 833, 836 (2d Cir. 1976); *United States v. Erb*, 543 F.2d 438, 445 (2d Cir.), *cert. denied*, 429 U.S. 981 (1976); *United States v. Pinto*, 503 F.2d 718, 723-24 (2d Cir. 1974).

Defendants seek to circumvent the firmly implanted rule of waiver by contending that this Court should notice as plain error the alleged unconstitutionality of § 1201(b) and its impact on this case. Defendants' arguments simply fail to provide a basis for this Court to exercise its discretionary power to find plain error.

In *United States v. Indiviglio*, *supra*, this Court recognized the principle that "[e]xercise of our power to notice even 'plain error,' . . . is discretionary." 352 F.2d at 280. In *Indiviglio*, as here, the defendant was represented at trial by experienced trial lawyers, who failed to object on the constitutional grounds newly asserted on appeal, despite the existence of settled case law which might have supported the objection below. *Id.** Given

* In *Indiviglio*, the defendant asserted *Massiah v. United States*, 377 U.S. 201 (1964) and *Escobedo v. Illinois*, 378 U.S. 478 (1964), as the basis for raising a new objection on appeal, despite the fact that these cases had been decided several months prior to his trial. In this case, the most recent of the Supreme Court decisions dealing with the constitutionality of presumptions relied on by defense counsel is *Barnes v. United States*, 412 U.S. 837 (1973), a case decided almost four years prior to the instant trial. Thus, "[i]t was to be expected that experienced trial lawyers, such as those who represented [the] defendant[s] at this trial, took note of these decisions and evaluated their relevance to [the] defendant[s]' case. *United States v. Indiviglio*, *supra*, 352 F.2d at 279.

Moreover, while, as we demonstrate *infra*, defendants' present constitutional argument is without merit, even a cursory review of the relevant case law would have revealed to defense counsel at trial that objection to the § 1201(b) presumption was neither patently futile nor could it be based only on appellate decisions yet to be decided. For this reason, the rule of plain error is wholly inapplicable. *United States v. Indiviglio*, *supra*, 352 F.2d at 280 n.7. Cf., *United States v. Bianco*, 534 F.2d 501, 507 (2d Cir.), *cert. denied*, 429 U.S. 822 (1976); *Stubbs v. Smith*, 533 F.2d 64, 69 (2d Cir. 1976); *United States v. Rivera*, *supra*, 513 F.2d at 526; *United States v. Liguori*, 438 F.2d 663, 667 (2d Cir. 1971).

these and other factors, such as the opportunity provided by timely objections to permit both the District Court and the prosecutor to avoid potential errors and the absence of any manifest injustice or unfairness in the proceedings, this Court declined to exercise its *discretionary power* to notice "plain error". *Id.* at 280.

In the aftermath of *Indiviglio*, this Court has sparingly used its plain error power, recognizing that the doctrine applies

"[o]nly if serious injustice was inflicted upon a defendant, or if he was convicted in a manner inconsistent with fairness and integrity of judicial proceedings. . . ." *United States v. Bryant*, 480 F.2d 785, 789-90 n.3 (2d Cir. 1973).

In fact, the invitation to find plain error has been declined in cases strikingly similar to the present one. Thus, for example, in *United States v. Coke*, 364 F.2d 484 (2d Cir. 1966), the defendant, for the first time on appeal, asserted the unconstitutionality of the statutory presumption contained in former §174 of Title 21, United States Code, of knowledge arising from the mere possession of cocaine.* Among the several reasons for rejecting this belated challenge, Judge Anderson declared:

"no objection to the use of the presumption was made in the trial court. The general objection attacking the sufficiency of the Government's case was not sufficient properly to raise and preserve the constitutional question. *United States v. Indiviglio*, 352 F.2d 276, 279-280 (2d Cir. 1965)."

* This presumption was later declared unconstitutional by the Supreme Court in *Turner v. United States*, 396 U.S. 398 (1970).

See also *United States v. Hendrix*, *supra*, 542 F.2d at 882-83.*

As in *Coke*, the refusal to notice plain error is particularly appropriate when a unique constitutional claim is made for the first time on appeal. Thus, the failure to have raised the issue in the trial court and to compile an evidentiary record to demonstrate the alleged failure of a statutory presumption to meet constitutional standards, deprives the appellate court of an adequate record against which to measure defendants' claims.**

*In *United States v. Hendrix*, *supra*, the defendant did not object to the trial court's charge on the presumption of sanity and then asserted on appeal that this instruction was plain error. This Court, after reviewing the history of that presumption, concluded that the trial court had erred in instructing the jury concerning the presumption of sanity. *Id.* at 882. This conclusion notwithstanding, the Court further held that such error did not warrant the "exercise of our discretionary power of reversing for plain error" [citing *United States v. Indiviglio*]. *Id.* at 883.

** In addition to *United States v. Coke*, *supra*, 364 F.2d at 485, see in accord, *United States v. Reid*, 347 F.2d 344, 345 (2d Cir. 1965); *United States v. Martinez*, 333 F.2d 80, 81 (2d Cir.), *cert. denied*, 379 U.S. 907 (1964); *United States v. Sorenson*, 330 F.2d 1018, 1021 (2d Cir. 1964), *cert. denied*, 380 U.S. 945 (1965); *DeRose v. United States*, 315 F.2d 482, 487 (9th Cir.), *cert. denied*, 375 U.S. 846 (1963); *United States v. Gibson*, 310 F.2d 79, 81 (2d Cir. 1962); *cf.*, *Leary v. United States*, 395 U.S. 6, 53 n.116 (1969); *United States v. Adams*, 293 F. Supp. 776, 778 (S.D.N.Y. 1968).

In this regard, it is noteworthy that defendants' present attempt to create a record on appeal based upon fragmented excerpts from the legislative history of § 1201(b) and counsel's own conclusory rhetoric is an inadequate substitution for the type of available, pertinent data which would permit a proper analysis of the issues sought to be raised. See, *infra*, at p. 31. Since the burden of attacking the statutory presumption is on defendants, their failure to have raised the matter in the District Court is particularly egregious and strongly militates against the exercise of the Court's plain error authority. *United States v. Coke*, *supra*. See also *DeRose v. United States*, 315 F.2d at 487.

[Footnote continued on following page]

Furthermore, the record here makes clear that defendants' "failure to object on the ground now advanced must be considered something more than a mere technical defect." *United States v. Indiviglio, supra*, 352 F.2d at 281. We submit—indeed, we attempted to prove in the District Court *—that the failure of Burnell and Moore to challenge either the § 1201(b) presumption or the general sufficiency of evidence on the interstate element was a strategic and tactical decision designed to

Moreover, where, as here, the constitutionality of § 1201(b) has never before been challenged, much less adversely determined, a finding of "plain error" is particularly inappropriate. As this Court said in *United States v. Wright*, 466 F.2d 1256, 1259 (2d Cir. 1972), *cert. denied*, 410 U.S. 916 (1973).

"even in the exercise of our discretionary powers to notice plain error, we do not think we should deal with these issues now. It is fair to say that the facial unconstitutionality of the . . . statute does not leap from the pages of the United States Reports. The question is 'at least sufficiently close' to take it out of the realm of plain error."

Accord, United States v. Manning, 448 F.2d 992, 1002 (2d Cir.; *en banc*), *cert. denied*, 404 U.S. 995 (1971); *cf., United States v. Traumunti*, 500 F.2d 1334, 1341 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974).

* Once the Government became aware that on appeal the defendants were challenging the constitutionality of § 1201(b) and the sufficiency of the evidence on the interstate element of Counts 1 and 2, we moved in the District Court to supplement the record of this case on appeal, pursuant to Fed. R. App. P. 10(e), to demonstrate the nature and extent of the defendants' tactical decision. In a Memorandum Order, dated August 5, 1977, Judge Broderick denied this motion after noting that the Government had sought to add to the record "affidavits of the attorneys representing the Government in the trial of this action, to the effect that one defense counsel told a Government attorney during the trial, and the second defense counsel told a second Government attorney after the trial (and after the appeal had been taken), that defense counsel at the trial had made a tactical decision to challenge neither federal jurisdiction nor the validity of the statutory presumption provided for in 18 U.S.C. § 1201(b)." *United States v. Burnell and Moore*, 76 Cr. 1121 (VLB) (S.D.N.Y. Aug. 5, 1977; Memorandum Order).

advance their own best interests.* For example, under the federal kidnapping laws, 18 U.S.C. §§ 1201(a) and 1201(c), Burnell and Moore, if convicted, faced maximum terms of life imprisonment, but no mandatory minimum sentences.** By contrast, under the applicable provision of the New York Penal Law, § 135.25—which makes kidnapping for ransom an A-I felony—defendants faced both a maximum term of life imprisonment *and a mandatory minimum* sentence of from 15 to 25 years in custody. New York Penal Law § 70.00. That the potentially less severe punishments mandated by the federal law guided defendants' tactics is made apparent from the fact that they did not argue—let alone mention—either to the trial court or the jury, the now claimed unconstitutionality of § 1201(b) and the alleged insufficiency of the evidence on the jurisdictional element of an interstate nexus. Indeed, if this Court were to consider and accept defendants' present contentions, their tactics would pay off with considerable benefits. Thus, it is clear that any earlier assertion of the present constitutional claims would not have barred defendants' retrial in the state courts. See New York Crim. Proc. Law § 40.20(2)(f); *Klein v. Murtagh*, 44 App. Div. 2d 465, 355 N.Y.S.2d 622 (2d Dept.), *aff'd mem.*, 34 N.Y.2d 988, 360 N.Y.S.2d 416 (1974). Accordingly, by remaining mute, defendants took the gamble—which was really no gamble at all—that they would achieve acquittals in the trial court,*** but, in the event of convictions, still would have a second "bite of the apple"

* See *Wainwright v. Sykes*, *supra*, 97 S. Ct. at 2508 (opinion of the Court); 2509-10 (opinion of the Chief Justice); 2510-12 (opinion of Mr. Justice Stevens); *Estelle v. Williams*, *supra*, and 425 U.S. at 514-15 (Powell, J., concurring).

** Except to the extent of mandatory parole eligibility after 10 years, if the sentence imposed exceeded a term of 30 years in custody. 18 U.S.C. § 4205.

*** Such a general verdict of not guilty would, of course, have barred further prosecution on double jeopardy grounds.

—this time with full knowledge of the entirety of the Government's case, its strengths and weaknesses.*

Finally, defendants cannot point to any sound reason for this Court to invoke its plain error authority. The alleged constitutional infirmity of § 1201(b) does not go to the defendants' basic participation in the crime—which was established overwhelmingly at trial. In the circumstances of this case, the present claims simply do not strike at the fundamental fairness of the proceedings in the trial court, nor do they rise to the level of a manifest injustice. *United States v. Indiviglio, supra*. In sum, having deliberately and inexcusably bypassed the proper and orderly procedures for asserting their constitutional claims, defendants should not now be heard to complain that their convictions must be reversed as plain error.**

* For example, defendants now know all of the prosecution's witnesses, that some are hostile to the Government and others are not United States citizens, or are from out of state, and that the Government does not know of accomplices, if there are any. This knowledge, together with the liberal discovery which they have enjoyed, the lapse of time and potential unavailability of witnesses, all would redound to defendants' benefit if they were to be retried either in federal or state court.

** In reply, defendants may argue that even if their trial attorneys made a tactical decision to forego a challenge to the interstate nexus, they were not personally consulted in this process and should not now be bound by its result. Such a contention, however, has clearly been foreclosed because "the decision to assert or not to assert constitutional rights or constitutionally based objections at trial is necessarily entrusted to the defendant's attorney, who must make on-the-spot decisions at virtually all stages of a criminal trial." *Wainwright v. Sykes, supra*, 97 S. Ct. at 2509 (opinion of the Chief Justice). *Accord, Id.* at 2508 (opinion of the Court): 2511 (opinion of Mr. Justice Stevens); *Estelle v. Williams, supra*, 425 U.S. at 512; *Ennis v. LeVre*, Dkt. No. 76-2155, slip op. 5205, 5211-12 (2d Cir. Aug. 9, 1977); *United States v. O'Looney*, 544 F.2d 385, 392 n.5 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 692 (1977).

C. The presumption contained in § 1201(b) is constitutional, especially as applied in this case.

Burnell and Moore argue that the statutory inference set forth in § 1201(b)—that the failure to release a kidnapping victim within 24 hours creates a rebuttable presumption that the victim has been transported in interstate or foreign commerce—is unconstitutional. They further contend that the District Court's instructions, permitting the jury to consider this non-conclusive inference, violated defendants' due process rights. Joining the two contentions, defendants assert that their convictions must be reversed. While, as set forth above, we vigorously believe that the Court should not reach these untimely and waived arguments—particularly since the issues raised appear to be matters not squarely decided by any other court*—the Government submits that the statutory pre-

* We are aware of no case in which the constitutionality of § 1201(b) has been squarely considered or determined. However, with the exception of *United States v. Pheaster*, 544 F.2d 353, 383 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 1243 (1977), in which the district court did not instruct the jury as to the statutory presumption because of a concern that the provision was unconstitutional, those cases which have addressed this statutory provisions have referred favorably to the inference. *E.g.*, *United States v. Jones*, 508 F.2d 1271, 1273 (4th Cir.), *cert. denied*, 421 U.S. 950 (1975) ("if [the victim] was abducted by [the defendant], then the statute prima facie presumed that he was transported interstate, for he was not released within 24 hours."); *Waley v. Johnston*, 124 F.2d 587, 588 (9th Cir. 1941) ("Since the indictment alleged that the kidnapped person was not released from custody within seven days [the earlier provision of this statute] from the time of his seizure, jurisdiction in the [federal] court affirmatively appears [from the statute]. . ."), *rev'd on other grounds*, 316 U.S. 101 (1942); *United States v. Rees*, 193 F. Supp. 849, 860 (D. Md. 1961) (wherein the court favorably noted the evidentiary value of § 1201(b)). Even in *United States v. Pheaster*, *supra*, the Court of Appeals, while noting that "Section 1201(b) of Title

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sumption does comport with constitutional standards, as applied to this case.

In resolving the constitutionality of statutory and common law presumptions in criminal cases the Supreme Court has employed essentially two different standards: the rational connection test, *Tot v. United States*, 319 U.S. 463 (1943),* and the more-likely-than-not test, *Leary v. United States*, 395 U.S. 6 (1969).** Most

18 provides a statutory presumption of interstate or foreign commerce which would be triggered by the facts of this case," decided that, in view of the district court's decision, it would "express no opinion as to the constitutionality of that provision." 544 F.2d at 383 and n.19.

*In *Tot v. United States*, *supra*, 319 U.S. at 467-68, the Court enunciated the rational connection test in the following terms:

"Under our decisions, a statutory presumption cannot be sustained if there be *no* rational connection between the fact proved and the ultimate fact presumed, *if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience*. This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to *have a reasonable relation to the circumstances of life as we know them*, it is not competent for the legislature to create it as a rule governing the procedure of courts." [Emphasis supplied].

**The more-likely-than-not test was first stated by the Court in *Leary v. United States*, *supra*, 395 U.S. at 36, as follows:

"[A] criminal statutory presumption must be regarded as 'irrational' or 'arbitrary', and hence unconstitutional unless it can be at least said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. And in the judicial assessment, the congressional determination favoring the particular presumption must, of course, weigh heavily."

recently, in *Barnes v. United States*, 412 U.S. 837, 843 (1973), the Court, after noting that the teaching of prior decisions on this subject was "far from clear", suggested that the differences between these previously applied standards are more of semantics and focus than substance. In this regard, we submit that a proper constitutional analysis must commence with consideration of whether the presumed fact, by its nature, is one which rests upon empirical substantiation or upon the common experience and general relationships of time and events.* Viewed in this proper perspective, there is no real difference between the rational connection test and the

* Defendants initially press a third test: the "reasonable doubt standard". After raising the issue, defendants self-servingly declare that the Court need not resolve it since they claim § 1201(b) fails under any standard. While a number of cases have noted the possible requirement that, for a presumption to be constitutional, the evidence necessary to invoke the inference must be sufficient to support the inference itself beyond a reasonable doubt, no court has squarely decided this question. See *Barnes v. United States*, *supra*, 412 U.S. at 843; *Leary v. United States*, *supra*, 395 U.S. at 36 n.64; *Turner v. United States*, 396 U.S. 398, 416 (1970). In *Barnes*, the Supreme Court acknowledged that the reasonable doubt standard is the more stringent of these tests and, without deciding whether that standard applies or in what circumstances, held:

"What has been established by the cases, however, is at least this: that if a statutory inference submitted to the jury as sufficient to support conviction satisfies the reasonable-doubt standard (that is, the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt) as well as the more-likely-than-not standard, then it clearly accords with due process." 412 U.S. at 843.

We submit that if the reasonable doubt standard has application in any case, it surely does not apply here since there was substantial circumstantial evidence—apart from the statutory presumption—upon which the Government relied to prove the interstate nexus (see *infra*, at pp. 39-42). Moreover, the District Court did not charge the inference as conclusive proof, but merely as another piece of circumstantial evidence which might be considered by the jury in reaching its decision. *United States v. Tavoularis*, 515 F.2d 1070, 1075 n.11 (2d Cir. 1975).

more-likely-than-not test; under either standard, the presumption contained in § 1201(b) must be held constitutional.

To determine the constitutionality of the presumption contained in § 1201(b), we must start with an examination of the presumption itself and what it seeks to impute. The § 1201(b) presumption does not seek to impute a specific level of knowledge to a defendant based upon the operative fact. Instead, the presumption suggests a general relationship between two facts: the longer a victim remains captive with his kidnappers and undiscovered, the greater the likelihood that he has been removed from common surroundings and transported across state lines. Thus, in the first instance, underlying the statutory inference is the weight of common sense and life experiences, drawing rational and ordinary relationships between sets of events easily analyzed. *Barnes v. United States, supra*; *United States v. Gainey*, 380 U.S. 63, 67 (1965). Indeed, in common experience, one can draw the rational and logical understanding that those who have kidnapped a man will endeavor to secret him at a place where it is not likely that either they or their victim be detected—a place where they would be both unknown to the local authorities and undisturbed by intruders. Common sense dictates that interstate transportation occur because one of the objects of kidnapping for ransom is to remove the victim as far away as possible from his environs, not only to prevent his escape in familiar surroundings, but also to put space and boundaries between the kidnappers and the authorities who may become involved. Leaving the state of seizure simply insures the venture by making detection of the assailants more difficult. This is particularly so in a day and age when means of high speed and easily accessible transportation assure that the borders of any state can be crossed within a 24 hour period. In short, the presumption of interstate movement in § 1201(b)

does not require any knowledge of specific demonstrable facts, but is logically supportable merely on the basis of a common sense understanding of daily events and experiences.*

Defendants' contention that Congress lacked any supporting empirical data to warrant enactment of the presumption is both misplaced and wrong. First, since the statute does not seek to substitute a presumption for a fact that otherwise requires empirical knowledge, but is merely a circumstantial bridge between two logically related facts, no scrutiny of the data relied upon by Congress is required. The Supreme Court cases which have examined the constitutionality of presumptions make this distinction plain. Only *Leary v. United States, supra*, and *Turner v. United States, supra*, have examined the empirical basis for Congressional enactment of a statutory presumption. Both *Leary* and *Turner* involved legislated presumptions of a defendant's knowledge that narcotics in his possession were imported. In each case, the fact presumed—that the defendant *knew* a particular drug in his possession was imported—did not flow from common relationships and everyday events but required a specific knowledge of a body of additional facts to warrant the statutory presumption.** By contrast, all of the

* As phrased by the Court in *Tot, supra*, the § 1201(b) presumption is valid simply because it bears "a reasonable relation to the circumstances of life as we know them."

** Thus, for example, under the presumption invalidated in *Leary*, a defendant first would have to *know* that the majority of marijuana (79%) found in the United States was imported before there could be a basis to presume that he *knew* the marijuana in his possession was imported. Absent proof of the defendant's knowledge of the first operative fact, the presumed conclusion did not bear a rational relationship to the second operative fact—mere possession. Similarly, in *Turner*, while striking down the presumption relative to cocaine, the Court upheld the heroin presumption, reasoning from "the fact that

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other constitutional presumption decisions have been reached *without* any consideration of the empirical data underlying the legislative enactment. See *Barnes v. United States*, *supra* (inference of knowledge of stolen goods from unexplained recent possession, held constitutional); *United States v. Romano*, 382 U.S. 136 (1965) (inference of possession of a still from presence, held unconstitutional); *United States v. Gainey*, *supra* (inference of "carrying on" unregistered distillery from mere presence, held constitutional);* *Tot v. United States*, *supra*, (inference that firearm was received in interstate commerce from facts that defendant was in possession and previously had been convicted of a crime, held unconstitutional). The upshot of these decisions clearly indicates that the presumption of interstate movement contained in § 1201(b) is constitutional, since it is supportable as a matter of common sense, even without regard to the underlying data considered by Congress. *Leyva v. Superintendent*, 428 F. Supp. 1, 5 (E.D.N.Y. 1977).**

little, if any, heroin is made in the United States," 396 U.S. at 416, that "[c]ommon sense" . . . tells us that those who traffic in heroin will inevitably become aware that the product they deal in is smuggled, unless they practice a studied ignorance to which they are not entitled." *Id.* at 417 (footnotes omitted).

* "Congress was undoubtedly aware that manufacturers of illegal liquor are notorious for the deftness with which they locate arcane spots for plying their trade. Legislative recognition of the implications of seclusion only confirms what the folklore teaches—that strangers to the illegal business rarely penetrate the curtain of secrecy." *United States v. Gainey*, *supra*, 380 U.S. at 67-68. As is shown *supra* at p. 28, the same can be said of the inference created by § 1201(b).

** In *Leyva*, *supra*, Judge Neaher was called upon to determine the constitutionality of the statutory presumption found in New York Penal Law § 220.25 ("The presence of a dangerous drug in an automobile . . . is presumptive evidence of knowing possession thereof by each and every person in the automobile. . ."). In upholding the constitutionality of this presumption, the Court noted: "[w]hereas statistical analysis provided the factual basis

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Second, contrary to defendants' claim that the § 1201(b) presumption was enacted by Congress without any justifiable empirical basis, a history of the statutory presumption shows that there was sufficient consideration of the question by Congress to warrant upholding its constitutionality, giving due recognition to the principle that "in the judicial assessment the congressional determination favoring the particular presumption must . . . weigh heavily." *Leary v. United States*, *supra*, 395 U.S. at 36.*

Moore's contention notwithstanding (Mr. App. Br. 11), it is clear that from the original enactment in 1934, Congress intended the interstate nexus presumption to be more than merely an investigative aid.** When the

in *Leary* and *Turner* which precluded any rational inference . . . in this instance common experience must be relied on to support the inference", simply because the statute was directed against a "not uncommon situation." 428 F. Supp. at 5. Thus, as the Supreme Court stated in *Gainey*, *supra*, 380 U.S. at 67, "it is precisely when courts have been unable to agree as to the exact relevance of a frequently occurring fact in an atmosphere pregnant with illegality that Congress' resolution is appropriate."

* We think it bears emphasis that defendants' claims of the lack of data to evaluate the constitutionality of the presumption point up their own failure to have raised the issue properly in the District Court, where an adequate factual record could have been made. That such statistical data might well exist in the minds of expert witnesses or in other non-published forms, such as in the computers located in various law enforcement agencies, is never mentioned by defendants. Apart from the fact that statistics do exist, *infra*, Burnell's and Moore's *ipse dixit* approach to the issue presented here is astounding, since the burden to proceed with the constitutional attack was with them. See, *supra*, p. 21.

** Indeed, the very language of § 1201(b) creating a "rebuttable presumption"—belies Moore's claim that Congress never intended the statutory presumption to have evidentiary effect at a trial.

original form of the present-day presumption * was first reported for consideration by Congress, the House Report made clear the dual investigative and evidentiary purpose intended, as well as the Congressional understanding of the need for a rational connection to justify the provision:

"The purpose of this provision is to clear up border-line cases, justifying Federal investigation in most of such cases and assuring the validity of Federal prosecution in numerous instances in which such prosecution would be questionable under the present form of this act. The legality of such a presumption would seem to be fairly within the rule established by the United States Supreme Court in Mobile . . . Railroad Co. v. Turnipseed, (219 U.S. 35):

' . . . that there shall be some rational connection between the fact proved and the fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.'" H.R. Rep. No. 1457, 73d Cong., 2d Sess. 2 (1934) (emphasis supplied.**

* In its earliest form in 1934, the presumption became operative after a failure to release the victim within seven days. 48 Stat. 781 (1934). Subsequent codification recognizing modernized and speedier means of transportation, brought the presumption to its present form.

** The Senate Report concerning this legislation, S. Rep. No. 534, 73d Cong., 2d Sess. 1 (1934), contained the recommendation of the Department of Justice in support of this bill which similarly stated: "[t]his is a sound amendment which will clear up border-line cases, justifying Federal investigation in most such cases and assuring the validity of Federal prosecution in numerous instances in which such prosecution would be questionable [without this presumption]." (Emphasis supplied).

Moreover, Congress was in a justifiable position to enact the presumption on the basis of extensive hearings conducted just two years earlier, prior to enactment of the original federal kidnapping law ("Lindberg Law"). 47 Stat. 326 (1932). Thus, for example, during the 1932 hearings, Congress learned from the Chicago police commissioner that

"Kidnappings for ransom have become a major operation of our organized criminal bands; and it has been my observation that *the victims, in a majority of the cases have been transported across State lines.*" *Hearing on H.R. 5657 Before the House Committee on the Judiciary*, 72d Cong., 1st Sess. 13 (1932). (Emphasis supplied).*

The § 1201(b) presumption thereafter was amended in 1956 to reduce the period of the kidnap victim's absence from seven days to 24 hours. 70 Stat. 1043 (1956). In so acting, Congress not only stressed the need for a

* See also *Id.* at 2, 10 and 17. As one court has recently noted:

"The legislative history of the act is not inconsistent with our interpretation. It reveals that one of the evils sought to be remedied was the impunity with which kidnapping could be accomplished by crossing state lines and thereby thwarting arrest by police officers in the state of origin. As the defendant indicates, there was some discussion of sophisticated offenders who knew that the law was less scrupulously enforced in another state, and, for that reason, transported their victims to the other state.... Indeed, whether or not the interstate transportation is prompted by the knowledge that the state of destination is 'friendly' territory, officials in the state of origin were equally powerless to pursue and apprehend the kidnappers. It was precisely this problem that the statute was designed to overcome" *United States v. Napier*, 518 F.2d 316, 319 (9th Cir.), *cert. denied*, 423 U.S. 895 (1975).

more prompt investigative response by the FBI, but also repeated its earlier views concerning the constitutionality of the inference created:

"That presumption, of course, was not conclusive; it was a presumption of fact which could be rebutted by credible evidence. In addition, the amendment had for its purpose the clearing up of borderline cases, justifying Federal investigation in most of such cases, and assured the validity of Federal prosecutions in which prosecution might be questionable under the then present form of the statute. Moreover, the legality of such a presumption was clearly within the case law established by the United States Supreme Court." S. Rep. No. 2820, 84th Cong., 2d Sess. 2 (1956), and H.R. Rep. No. 2763, 84th Cong., 2d Sess. 2 (1956).

In 1974, hearings again were conducted by Congress to consider certain new amendments to the kidnapping laws.* *Hearings on H.R. 4191 and H.R. 8722 Before*

* Prior amendments to the federal kidnapping statutes were enacted in 1972 principally to make clear that kidnapping, rather than interstate or foreign transportation of the victim, was the gist of these offenses. See H.R. Rep. No. 1268, 92nd Cong., 2d Sess. (1972). Thus, as the Ninth Circuit Court of Appeals noted in *United States v. Napier*, *supra*, 518 F.2d at 319:

"It is the act of kidnapping which the Lindberg Act proscribes. The requirement that the offender cross state lines merely furnishes a basis for the exercise of federal jurisdiction and *does not constitute an element of the offense*" (emphasis added).

The thrust of the above quotation is carried forward in the proposed new Federal Criminal Code, S. 1437, 95th Cong., 1st Sess. (1977), which makes the question of Federal jurisdiction one for the court alone and provides for determination of that issue prior to trial. *Id.* § 211 at 296-97 (proposed Fed. R. Crim. P. 25.1(b)). In addition, while the proposed code does not include

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the Subcommittee on Crime of the House Committee on the Judiciary, 93rd Cong., 2d Sess. (1974). During these hearings, Congressman Conyers inquired of the FBI as to the number of kidnapping cases referred to and investigated by the FBI, as well as the number of those cases referred back to local law enforcement officials after finding a lack of jurisdiction under 18 U.S.C. § 1201(a) and § 1201(a)(1). *Id.* at 2. In response, the FBI provided statistical data for the calendar year 1973 which revealed what common sense and the prior legislative determination had already shown—that of 1,615 kidnapping cases referred to and investigated by the FBI, only 146 resulted in the subject being prosecuted in local court due to a lack of federal jurisdiction under § 1201(a). *Id.* at 3. Put another way, only 9% of the cases which the FBI investigated did not sustain federal jurisdiction.* Thus, the statistical data before Congress con-

the present § 1201(b) presumption, *id.* § 1621, it does expand the bases of federal jurisdiction to include kidnapping offenses committed during the commission of the crime of extortion as defined in § 1722 of the proposed act. *Id.* § 1621(c)(4). See also *Id.* § 1001. On the facts at bar, this new provision would provide an additional basis for jurisdiction here.

* The Government concedes, of course, that the foregoing figures do not directly address § 1201(b) since it is not precisely clear how many of the 1,615 cases actually were prosecuted. However, the clear impact of these figures is that in substantially more than a majority of the cases investigated by the FBI the interstate nexus actually was satisfied. Moreover, these figures indicate that statistics concerning § 1201(b) could have been obtained had defendants sought to raise this issue in proper fashion below. Finally, the quotation from Congressman Forsythe, appearing on page 34 of Burnell's brief, is taken wholly out of context. Mr. Forsythe, at that time, was proposing the enactment of a second presumption in the kidnapping law and, in attempting to defend the constitutionality of his presumption, which a legislative attorney had advised was unconstitutional, *Hearings on H.R. 4191 and H.R. 8722, supra*, at p. 34, the Congressman was urging its passage anyway, on the theory that "the

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firmed "the implications of . . . what folklore teaches," *United States v. Gainey, supra*, 380 U.S. at 67, and further substantiated the rationality of the inference that was otherwise supportable as a matter of common sense and experience.

Moreover, in evaluating the constitutionality of the § 1201(b) presumption as applied in this case, the provision cannot be judged in the abstract, but must be viewed both in the factual setting which gave rise to it and in the context of the trial court's instructions on this topic. Thus, it must be remembered that in this case the kidnap victim was never again heard from or seen after his disappearance three months before trial. Although the presumption speaks in terms of 24 hours, that one day requirement was irrelevant here since the jury knew of Huggins' three month absence. In addition, all of the other evidence in this case—exhibits, testimony and the reasonable inferences arising therefrom, (see *infra* pp. 39-42)—pointed in one direction—that Huggins had been transported out of New York. In sum, the statutory inference, far from being vital and assuming sole significance, was "but one bit of circumstantial evidence among many," *United States v. Tavoularis, supra*, 515 F.2d at 1075 n.11, "which did no more than 'accord to [all of] the evidence, if unexplained, its natural probative force.'" *United States*

congressional course weighs heavily" in determining the constitutionality of the presumption. *Id.* at 40 and 52; see also *Id.* at 39-40 and 52. Even more compelling, the quoted statement by Congressman Forsythe was made on February 27, 1974, two weeks before the FBI statistics *supra* were submitted to the subcommittee on March 13, 1974.

v. *Gainey*, *supra*, 380 U.S. at 71.* For this reason, whatever the arguable merits in the abstract, the constitutionality of this inference as applied in this particular case must withstand attack. *United States v. Williams*, Dkt. No. 76-2332, slip op. 1, 14 n.2 (4th Cir. July 20, 1977) ("On the facts of this case, we see no constitutional infirmity in the use of the statutory inference."); *United States v. Manarite*, 448 F.2d 583, 594 (2d Cir.), *cert. denied*, 404 U.S. 947 (1971); *cf.*, *Stubbs v. Smith*, *supra*, 533 F.2d at 70-71.

Finally, the statute must be viewed in the context of the specific instructions to the jury. Here, the District Court carefully instructed the jury that the statutory inference contained in § 1201(b) was neither conclusive nor solely sufficient to sustain a verdict. Judge Broderick told the jury that this statute did no more than permit another of any number of reasonable inferences which they might draw or reject from the proof. In fact, the court's charge went so far as to comply with the require-

* Since the § 1201(b) presumption is rebuttable, it, like other presumptions, "is out of the case" once "proof in rebuttal is introduced." *United States v. Hendrix*, *supra*, 542 F.2d at 882. Thus, had the defendants desired to contest this presumption, they could have done so in the trial court with impunity, even without testifying themselves. It is arguable that they simply could have called some expert witness—a criminology PhD. or long-time police officer—to testify against the presumption, thereby causing the inference to vanish. *United States v. Hendrix*, *supra*. The failure to do even this is but further evidence of their deliberate waiver of this issue.

Moreover, this would not have improperly shifted the burden of going forward to the defendants, since a statutory presumption—indeed, any presumption at all—is entitled to accomplish exactly that, whether couched in terms of "comparative convenience" or otherwise. See *Leary v. United States*, *supra*, 395 U.S. at 34; *Tot v. United States*, *supra*, 319 U.S. at 467, 469-70; *Morrison v. California*, 291 U.S. 82, 88-91 (1934). See also *Patterson v. New York*, 45 U.S.L.W. 4708 (June 17, 1977).

ments set out in *United States v. Crespo*, 422 F.2d 718, 720-22 (2d Cir.), *cert. denied*, 398 U.S. 914 (1970), as well as those specified in *United States v. Gainey*, *supra*, 380 U.S. at 69-71. Viewed in its entirety, the jury could not have been "lulled into a belief that the statutory inferences [were] conclusively binding upon them unless the defendant[s] successfully explain[ed] [their conduct] by bringing out rebutting evidence." *United States v. Crespo*, *supra*, 422 F.2d at 721.* Indeed, as charged in this case, the § 1201(b) inference took on no more significance than drawing for the jury a rational circumstantial connection that the evidence itself supported. *Leyva v. Superintendent*, *supra*, 428 F. Supp. at 5. Fairly judged in this context, defendants' claim of a violation of their due process rights is completely without merit.

D. The evidence against the defendants on the interstate element was sufficient, even apart from the § 1201(b) presumption.

In seeking reversal of their convictions, defendants contend that absent the § 1201(b) presumption there was no evidence from which the jury could find an interstate nexus on the kidnapping counts. Even assuming *arguendo* that this Court reaches the constitutionality of § 1201(b) and decides that question adversely to the Government—a result we vigorously contend is not correct—defendants are not entitled to a reversal because

* Indeed, the prosecutor did not argue the statutory inference to the jury, but analyzed the evidence that itself showed interstate movement. Defense counsel did not discuss this element at all in their summations since the interstate nexus had nothing to do with their defenses. Of course, counsel could have argued to the jury, if they thought it was a part of their defense, that the statutory presumption was completely irrational and should not be drawn.

the circumstantial evidence of interstate transportation was more than ample.

Defendants' contention that the interstate nexus evidence was insufficient, ignores the settled rule that on appeal the evidence must be viewed in the light most favorable to the Government,* according full weight to "the right of the jury to determine issues of credibility, weigh the evidence, and draw reasonable inferences of fact." ** Indeed, a review of the record makes clear that all of the evidence concerning where Huggins was taken once kidnapped, and the reasonable inferences arising therefrom, pointed in only one direction: that Huggins had been removed from the state of New York.

First, from the time of Huggins' disappearance at defendants' hands on December 1, 1976, and the victim's brief plea for assistance to his mother, no one saw or spoke to Huggins, apart from Burnell and Moore. Thus, we start with the basic facts that in a three-month period Huggins had not been seen in New York state, and that he disappeared from an address on Anthony Avenue in the Bronx—only scant minutes away from the George Washington Bridge.

Second, the jury's conclusion that Huggins was transported by his kidnappers out of New York is supported by several uncontradicted pieces of evidence. Early in the development of the kidnap plans, Burnell told Mary Burch that "Tico [Moore] would have somebody take him [Huggins] out of the states, he would never be

* *Glasser v. United States*, 315 U.S. 60 (1942).

** *United States v. Greenberg*, 534 F.2d 523, 524 (2d Cir.; *per curiam*), *cert. denied*, 429 U.S. 831 (1976). See also *United States v. Taylor*, *supra*.

found." (Tr. 509-13; 567-68; 640).^{*} This statement of design takes on special significance when viewed with Moore's remark during a telephone conversation with

^{*} Judge Broderick admitted this statement on the authority of Fed. R. Evid. 801(d)(2)(E) and *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285 (1892). On appeal defendants assert that this evidence should not have been admitted and that without Burnell's statement there was no proof of interstate transportation. These claims are meritless. First, as we now show, numerous other pieces of circumstantial evidence supported the same inference of interstate transportation, thereby both rendering this statement of less overall significance and providing the corroboration which Burnell and Moore claim to have been lacking. (Bur. App. Br. 40-41; Mre. App. Br. 19).

Second, Burnell's statements to Burch were made in furtherance of the conspiracy and thus were admissible under Rule 801(d)(2)(E). *United States v. Annunziato*, 293 F.2d 373, 380 (2d Cir.), *cert. denied*, 368 U.S. 919 (1961). The conspirators plainly had made this statement out of a need to coordinate with Burch, who was living with Burnell at the apartment where the kidnapping occurred. (Tr. 341ff). In telling Burch of the plot, Burnell was alerting her to future events that would concern her since she would be in a position to assist the conspirators if made aware of their plans, or accidentally to upset the execution of their plans if kept ignorant of them.

Burnell's further argument that the statements could only prove actions of some unknown third conspirator whose existence was never proven at trial, rather than of Moore or Burnell, is off the mark. The testimony was that Moore would *have* someone take care of removing Huggins from New York, which Moore could have accomplished without a third co-conspirator; for example, by the simple act of paying some unknowing person to deliver a car to New Jersey, Florida or some other distant place.

This evidence also was admissible under Fed. R. Evid. 803(3), as statements of intent or design. The statements of Burnell to Burch can be viewed: (1) as statements by Moore to Burnell of Moore's intent, which Burnell then passed on Burch; or, (2) as statements of the joint intent of the two conspirators, couched in language designed to minimize Burnell's involvement. Either view of the evidence leads to its admissibility under Rule 803(3) and *Hillmon*. Defendants argue that the applicability of *Hillmon* to this case is

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Martha Wigfall on the night of December 3rd, that Moore—the actor in Burnell's statement to Burch—was "getting ready to take [Huggins] out of town tonight." (GX 1). Moreover, the jury knew that Moore recently had been in New Jersey (Tr. 1160; GX 21A and B) to reconnoiter the Rockefeller Lookout Point located on the Palisades Parkway, and that the kidnappers had instructed Martha Wigfall to deliver the ransom payment to this public lookout point in New Jersey. The jury also was aware that Burnell planned to depart for South Carolina almost immediately upon receiving the ransom (Tr. 351), and that Wigfall had been told to return to the Nathan's restaurant in the Bronx, after depositing the ransom money, where she would be advised of Hug-

foreclosed by the legislative history of Rule 803(3). A statement in House Judiciary Committee Report 93-650 expresses the intent of the Committee that *Hillmon*, as codified, be limited to proof of the declarant's actions only. The Advisory Committee Note to the Rule, however, expressly left the *Hillmon* doctrine "undisturbed;" and the courts have clearly recognized that under *Hillmon* declarations of intent are admissible as evidence of actions of the declarant and others. See *United States v. Stanichich*, 550 F.2d 1294, 1297-98 n.1 (2d Cir. 1977); *United States v. Pheaster*, *supra*, 544 F.2d at 377. In *Hillmon* itself (as in *Pheaster*) Walker's declarations were admitted as evidence of Walker's and Hillmon's subsequent actions. Nevertheless, this case does not require full application of the *Hillmon* doctrine. In *Hillmon* and *Pheaster*, the declaration was admitted as evidence of a *prior arrangement* between the declarant and the other party to do the act, as well as of their subsequent doing of the act. Here, the evidence sought to do much less. Abundant evidence on the record established the conspiracy of Moore and Burnell, independent of the declaration. The declaration only added a further object to the joint plan to kidnap Huggins and demand a ransom—to transport Huggins "out of the states where he would never be found." Burnell's and Moore's intentions being intertwined, the application of the *Hillmon* doctrine was proper. *United States v. Annunziato*, *supra*.

gins' whereabouts. From these facts alone, the jury reasonably could infer that the kidnappers intended to go to New Jersey, pick up the ransom, release Huggins who was already held captive in that state * and—with the extra time assured by their plans—commence a getaway.

The logically supportable conclusion from the evidence—that Huggins had been transported across state lines—was buttressed further by the facts that in their telephone calls Burnell and Moore never permitted Wigfall to speak with Huggins—proving by inference that the victim was not with the caller when the calls were made—and that Huggins was not in either of his kidnappers' apartments. Indeed, given the fact that no one had seen Huggins in the vicinity of his neighborhood after the kidnapping, although Burnell and Moore were not reluctant to make themselves visible to friends and neighbors, the fair inference could be drawn that defendants had secluded their victim in some foreign community readily accessible to them where their comings and goings would not cause attention. The proximity of Burnell's and Moore's residences to New Jersey and its ready access certainly pointed circumstantially to that locale as the place where Huggins was secreted.**

In sum, based on this circumstantial evidence, and apart from the § 1201(b) presumption, the jury was in

* Obviously Huggins was not with Burnell and Moore when they were arrested.

** Moreover, in carrying their plan forward, Burnell and Moore displayed no aversion to causing others to travel interstate—such as directing that Mr. Huggins, the victim's father, travel from South Carolina to New York and carry a ransom for his son's release with him. From this displayed indifference to state boundaries, the jury was entitled to infer that the kidnappers were similarly willing to cross easier borders in their transport of Huggins.

a position to conclude that the interstate element had been satisfied.*

"Even if an innocent explanation of [the defendants' interstate] actions was plausible, . . . the settled law in this circuit [is] that, to be sufficient as a matter of law, circumstantial evidence need not exclude all possible inferences but those of guilt. [Citation omitted]. Questions of sufficiency of the evidence are often *sui generis*. The appropriate determination varies with the particular facts *sub judice*." *United States v. Lubrano*, 529 F.2d 633, 636 (2d Cir. 1975), *cert. denied*, 429 U.S. 818 (1976).

On the particular facts of this case—where the whereabouts of a kidnap victim remained unknown**—Judge Broderick was correct in finding that "a reasonable mind

* An analogous situation is found in prosecutions arising under the mail and wire fraud statutes where the jurisdictional element of mailing or use of interstate wires can be circumstantially proved. See *United States v. Toliver*, 541 F.2d 958, 966 (2d Cir. 1976).

** Indeed, were the jury barred from making inferences such as those in the present case, there could never be a kidnapping prosecution where the victim's subsequent whereabouts are unknown.

For this reason, Burnell's reliance on *United States v. Penn*, 131 F.2d 1021 (2d Cir. 1942), is misplaced. In *United States v. Penn*, the prosecution arose from a planned, but unexecuted, kidnapping; a far cry from the facts at bar. In that context, the court found the agreement between the conspirators insufficiently precise as to the actual place where the victims would be taken, once kidnapped, to sustain a conviction under the conspiracy statute. Here, of course, an actual kidnapping had taken place and the victim was missing. *United States v. Penn*, if applied to such facts, would preclude circumstantial proof because the kidnappers' agreement could never be shown with precision. More importantly, *United States v. Penn* no longer

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might fairly conclude [the interstate nexus] beyond a reasonable doubt." *United States v. Taylor, supra*, 464 F.2d at 243. (Emphasis added).

Finally, it bears repeated emphasis that the Government did not rely on the statutory presumption to prove the interstate element to the jury—indeed, the presumption was never mentioned to the jury by the prosecutor. Moreover, Judge Broderick specifically instructed the jury to evaluate all of the evidence on this issue and charged that the statutory presumption need not be afforded any weight at all by them. In these circumstances, any error arising from the trial court's charge concerning the § 1201(b) presumption must be viewed as harmless, particularly in the absence of objection at trial. See *Stubbs v. Smith, supra*, 533 F.2d at 70.*

represents the prevailing rule of law in light of the Supreme Court's recent decision in *United States v. Feola*, 420 U.S. 671 (1975), which overruled *United States v. Crimmins*, 123 F.2d 271 (2d Cir. 1941). See 420 U.S. at 686-96. Under the kidnapping law, one charged with a substantive kidnapping offense need not contemplate crossing state lines to be found guilty; he need only, in fact, cross them. Under *Feola*, no more is required to support a conspiracy conviction—one need not agree to cross state borders in furtherance of the conspiracy. It need only be shown that such borders have been crossed during the commission of the offense. See *United States v. Napier, supra*, 518 F.2d at 318-19. For these reasons, *United States v. Penn* does not apply, but, instead, the rationale of *Feola* makes clear the sufficiency of the evidence on the conspiracy to kidnap count of the Indictment. *United States v. Viruet*, 539 F.2d 295, 297 (2d Cir. 1976).

* See also *Chapman v. California*, 386 U.S. 18 (1967); *United States v. Hendrix, supra*; *United States v. James*, 494 F.2d 1007, 1031 (D.C. Cir.), cert. denied, 419 U.S. 1020 (1974).

The cases cited by the defendants to support a contrary position are inapposite. In *Leary v. United States, supra*, 395 U.S. at 31, relied on by Moore, use of the presumption, while not objected to in the charge, was otherwise objected to at trial, thereby preserving the issue for review. 395 U.S. at 32. More-

[Footnote continued on following page]

POINT II

The Evidence of the Interstate Nexus on Counts Three and Four Was Sufficient.

Burnell seeks reversal of his conviction on Counts Three and Four on the alleged ground that the evidence of the use of interstate communications was insufficient. This claim ignores the strong direct and circumstantial evidence that defendants made their first ransom demand in a telephone call to the victim's mother in South Carolina, and is frivolous in the extreme.

On the evening of December 1, 1976, shortly after Burnell and Moore kidnapped Huggins, they placed a call to the victim's mother at her home in Charleston, South Carolina. In this call, Burnell demanded a quarter of a million dollars in ransom and permitted Huggins to plead with his mother for cooperation to obtain his release. (See *supra*, at pp. 5-6). While Burnell apparently concedes—as indeed he must—that proof of this call would have been sufficient to establish the interstate element required by § 875(a), he contends that the identification of him as the caller by Ira Huggins was unduly

over, here, unlike *Leary*, there was only one theory advanced to the jury: whether Huggins had or had not been transported out of New York. The evidence of that, apart from the presumption, was sufficient and the presumption did not add another theory for the jury's consideration, but merely constituted additional circumstantial proof along the same lines. Similarly, Burnell's reliance on *Bollenbach v. United States*, 326 U.S. 607, 614 (1946), is misplaced because there, the jury reached a verdict only after seven hours of deadlock and only after the erroneous presumption was then charged. Here, of course, the jury reached a verdict not after being separately charged on the presumption, but after hearing Mary Burch's testimony—including her statement *supra*—reread to them. (Tr. 2053ff).

suggestive. This argument is legally and factually erroneous.*

Ira Huggins, the victim's brother, testified that he overheard the initial ransom demand phone conversation between his mother and the kidnapper by listening to it on another extension. At trial, Huggins identified a tape recording of Burnell's voice from a different ransom demand call (GX 2), as the voice of the "man who called down south" on December 1, 1976 and demanded \$250,000 for his brother's safe release. Huggins previously had made the same identification out-of-court from *another* of Burnell's recorded ransom demand calls, when interviewed by the Assistant United States Attorney on February 11, 1977. (Tr. 916). From these facts, Burnell claims the in-court voice identification was "unnecessarily suggestive".**

* From what has been shown *supra*, the facts of the kidnapping by Burnell and Moore and the placing of this call shortly thereafter, alone were sufficient for the jury to infer that defendants had made this interstate ransom demand. Only by recklessly assuming a contrary set of facts does Burnell push this point further. Burnell's contention that it was simply coincidental that the subsequent ransom demands were almost identical is merely an attempt to take from the jury a question properly decided by them. (Bur. App. Br. 44-45).

** Burnell's reliance on the alleged inconsistent voice identification testimony of Huggins' mother is misleading and of no moment. The Government never sought to elicit identification testimony from Mrs. Huggins. (Tr. 885-89). Indeed, the fact of Mrs. Huggins' inconsistent out-of-court identifications was made known to the jury only after Burnell's lawyer improperly went into this area on cross-examination (Tr. 889ff; 901-04), and then requested a stipulation concerning this subject from the Government. (Tr. 906). After this stipulation (Tr. 906-07) was read to the jury (Tr. 908), Judge Broderick informed them that "the substance and the effect of the stipulation . . . is that there is absolutely no identification of the [voice] that has been made by Mr[s]. Huggins." (Tr. 909). This instruction was not objected to by Burnell's lawyer. (Tr. 9100). Plainly, the Government did not rely on Mrs. Huggins' identification testimony, which it never elicited in the first place, and Burnell's contrary claim is disingenuous in the extreme.

Fed. R. Evid. 901(b)(5) provides that identification of a voice is proper

"whether heard firsthand or through . . . electronic . . . recording, by opinion based upon hearing the voice *at any time* under circumstances connecting it with the alleged speaker." [Emphasis supplied].

Here, nothing more was done: Ira Huggins had heard a kidnapper's voice on December 1, 1976, and upon hearing a recording of Burnell's voice at trial, identified it as that of the speaker in the December 1st call to South Carolina. Furthermore, this Court repeatedly has classified as "misplaced" and "without merit" arguments such as Burnell's directed to the admissibility of allegedly suggestive voice identifications. *United States v. Albergo*, 539 F.2d 860, 864 (2d Cir.), *cert. denied*, 429 U.S. 1000 (1976). See also *United States v. Armedo-Sarmiento*, 545 F.2d 785 (2d Cir. 1976), *cert. denied*, 97 S.Ct. 1330 (1977); *United States v. Chiarizio*, 525 F.2d 289, 296 (2d Cir. 1975); *United States v. Puco*, 453 F.2d 539, 544 n.14 (2d Cir. 1971), *cert. denied*, 414 U.S. 844 (1973); *United States v. Esposito*, 423 F. Supp. 908, 912-13 (S.D.N.Y. 1976; Weinfeld, *D.J.*).

In any event, the circumstances of Ira Huggins' identification of Burnell's voice simply do not admit of a conclusion of suggestiveness. The witness' in-court identification was based upon a recording different from that on which he had made his prior out-of-court identification. At no time did any law enforcement official tell Huggins the identity of the person whose voice he had selected. Huggins himself had had a full opportunity to hear the caller on December 1, 1976, under circumstances clearly sufficient and important to assure the accuracy of his later voice identification. In sum, Huggins' identification cannot be said to have been made under circumstances which would give rise to "a very

substantial likelihood of irreparable misidentification." *Manson v. Brathwaite*, — U.S. —, 45 U.S.L.W. 4681, 4686 (June 16, 1977), quoting, *Simmons v. United States*, 390 U.S. 377, 384 (1968); cf., *United States v. Green*, Dkt. No. 76-1438, slip op. 5445, 5450 (2d Cir. Aug. 22, 1977).

Finally, Burnell's claim of an impermissibly suggestive identification is rendered wholly speculative and totally without merit on this record given the other overwhelming evidence of his connection to the South Carolina telephone call. Thus, immediately following the call to South Carolina, Burnell called Martha Wigfall's home in New York and spoke with her brother Mark. Apart from the fact that Huggins was not allowed to speak during this call, the message delivered by Burnell was in all respects identical to the call to South Carolina, just moments earlier. Early the next morning, Burnell again called Wigfall's home. Again, the contents of this conversation with Martha Wigfall were wholly consistent with those of the previous two calls—\$250,000 ransom was to be brought to the transmission shop by Ms. Wigfall and Mr. Huggins at 4 P.M. on Friday. In addition, during this call, Burnell stated that Huggins had spoken with his mother on the previous night. Then, after the aborted ransom payment on Friday,* Moore spoke with Martha Wigfall. This conversation again was singularly consistent with the earlier calls which Burnell had made. Moore again reiterated the fact that Huggins had spoken with his mother on Wednesday night. Finally, the four calls that Ms. Wigfall received from Burnell and Moore on Saturday, December 4th, logically followed in both context and content from the earlier telephone conversations. When placed alongside the arrest of defendants within moments

* Prior to this event, there was yet a third call from Burnell to Wigfall's home, in which he reiterated the contents of his previous calls.

after Moore's final call, proof of these calls served to further establish the identification of defendants as authors of the series of ransom demands, including that to South Carolina on December 1st. Cf. *United States v. Green, supra*.

In brief, the circumstantial evidence of an interstate nexus was overwhelming, and plainly corroborated Ira Huggins' in-court voice identification. Thus, any possible error—and we submit none was committed—unquestionably was harmless beyond any doubt. See, e.g., *United States v. Hicks*, 495 F.2d 137 (D.C. Cir. 1974).

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

EUGENE NEAL KAPLAN,
JEFFREY E. LIVINGSTON,
ROBERT J. JOSSEN,
*Assistant United States Attorneys,
Of Counsel.*

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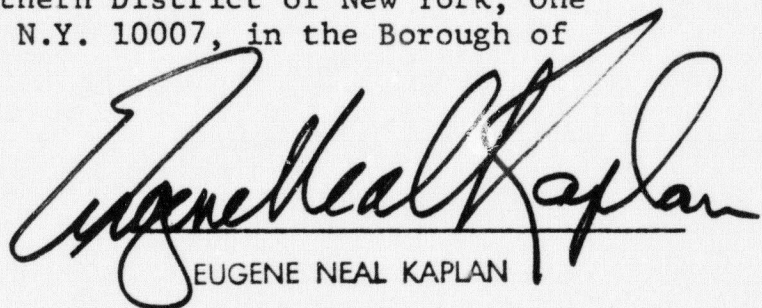
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EUGENE NEAL KAPLAN, being duly sworn
deposes and says that he ~~(she)~~ is employed in the office of the
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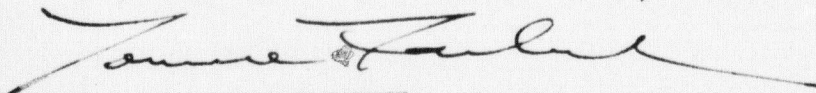
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